

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202) 424-7500
FACSIMILE (202) 424-7645
WWW.SWIDLAW.COM

WILLIAM L. FISHMAN
DIRECT DIAL (202) 945-6986
WLFISHMAN@SWIDLAW.COM

NEW YORK OFFICE
919 THIRD AVENUE
NEW YORK, NY 10022-9998
(212) 758-9500 FAX (212) 758-9526

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January 21, 2000

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Magalie Roman Salas
Commission Secretary
Federal Communications Commission
Portals II
445 12th Street, N.W.
Suite TW-A325
Washington, D.C.

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JAN 21 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: RCN Telecom Services, Inc.
Implementation of the Satellite Home Viewer Improvement Act of 1999
Retransmission Consent Issues
Docket No. 99-363

Dear Ms. Salas:

Enclosed please find an original plus nine (9) copies of RCN Telecom Services, Inc.'s Reply Comments in Docket No. 99-363. The extra copies are for distribution to the Commissioners. Enclosed also is an additional copy to be stamped and returned to our office.

If you have any questions concerning this submission, please do not hesitate to contact me.

Sincerely,



William L. Fishman

Enclosures

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Before the
Federal Communications Commission
Washington, D.C. 20554

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JAN 21 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:)
)
Implementation of the Satellite Home) CS Docket No. 99-363
Viewer Improvement Act of 1999)
)
Retransmission Consent Issues)

REPLY COMMENTS
Of
RCN TELECOM SERVICES, INC.

RCN Telecom Services, Inc. ("RCN"), by the undersigned counsel, hereby files reply comments in response to Part IV of the above-captioned matter. The Notice of Proposed Rulemaking ("NPRM") in Docket No. 99-363, FCC 99-406 *rel.* December 22, 1999, is the Commission's initial response to a series of Congressional directives given to the Commission in the Satellite Home Viewer Improvement Act ("SHVIA").¹ The SHVIA was passed by Congress principally to extend to satellite carriers a copyright license to carry local programming within the service area of local broadcasters ("local into local"). However, § 1009(a) directs the Commission to adopt rules that require broadcasters to negotiate their retransmission consent agreements in "good faith" and to avoid exclusivity in such agreements.² The NPRM invites comment on the meaning of "good faith" and, relatedly, what congress intended to convey in

¹ Title I of the Intellectual Property and Communications Act of 1999, 113 Stat. 1501, codified in scattered sections of 17 and 47 U.S.C.

² 47 U.S.C. § 325(b)(3)(c).

declaring that the absence of good faith is not demonstrated by agreements “containing different terms and conditions if such different terms and conditions are based on competitive market place considerations.”³ On January 12, 2000, a number of parties filed initial comments in response to the NPRM. This is RCN’s reply.

RCN is one of a number of new competitive entrants in the MVPD market. Uniquely, RCN seeks to provide, on an integrated basis, local and interexchange telephony, high-speed internet access, and wideband video services primarily to residential customers. RCN is also the largest OVS operator in the country, with OVS operations in the Boston, New York, Philadelphia, Washington, D.C. and San Francisco area markets, and OVS certificates in other major urban markets.⁴ RCN also provides traditional franchised cable services in the Northeast corridor. As such, RCN is naturally vitally concerned with the video distribution marketplace, and in particular with access to the programming which is vital for a competitive MVPD’s survival. Indeed, fair and reasonable access to programming is so vital to RCN that it recently filed a formal program access complaint against Cablevision Systems, Inc. for the latter’s unlawful refusal to provide RCN with vital local sports programming in New York City.⁵

³ 47 U.S.C. § 325(b)(3)(c)(ii).

⁴ RCN’s video operations are described in more detail in its Comments, filed August 6, 1999 in the Commission’s *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, (Docket No. 99-230) and in the Commission’s recently released Sixth Annual Report in that proceeding, FCC 99-418, *rel.* January 14, 2000, especially at pars. 129 to 130.

⁵ The Cable Services Bureau recently denied RCN’s complaint. *See RCN Telecom Services of New York, Inc. v. Cablevision, et al.*, Memorandum Opinion and Order (CSB), DA 99-2094, *rel.* October 7, 1999, *application for review pending*.

While wrestling with the issues of statutory interpretation posed by the NPRM, the Commission must not lose sight of the paramount importance of access to programming. As the Competitive Cable Coalition noted in a recent filing, "[p]rogramming is, of course, the very core of the MVPD industry. If competitors do not have reasonable access to programming, nothing else much matters. Consumers do not care about technical details, or legal theories, or economic models. They care about programming and the price they have to pay for that programming."⁶

Not surprisingly, the broadcasters, most starkly in the comments of the NAB, suggest that the programming marketplace functions perfectly as it is, and accordingly the Commission should essentially stay out of the way and allow the parties to negotiate their own arrangements.⁷ This view of the world is clearly not shared by the Congress or it would not have adopted legislation which imposes constraints on broadcasters. The broadcasters' sanguine confidence in the equality of bargaining power between entities like RCN and broadcasters is also at odds with reality as RCN perceives it. Whatever may be the case between local broadcasters and highly-clustered, vertically-integrated cable companies, RCN, as a nascent competitive MVPD with no marketpower in any of the areas in which it operates, is virtually at the mercy of local broadcasters. Recently, RCN sought carriage of the signal of a major local broadcaster in one of its markets only to be told that the signal would not be available unless RCN agreed to carry, in another market, programming of the broadcaster's affiliate. With channel limits in the distant community, RCN was put to the serious dilemma of attempting to bring new competition to a

⁶ Reply Comments of the Competitive Cable Coalition in Docket No. 99-230, at 9.

⁷ Comments of National Association of Broadcasters, p. 1, *passim*. See also Comments of CBS Corporation at 7 *et seq.*

large metropolitan area without a major local broadcast signal, or to face discontinuing existing programming in another market to carry the programming which was tied by the local broadcaster to carriage of the local broadcast signal.

Such behavior, whether or not an unlawful tying arrangement under the anti-trust laws, is contrary to the public interest and should be prohibited by regulations adopted pursuant to SHVIA. Both the language of the SHVIA and its legislative history, not to speak of prior program access legislation and its legislative history, make crystal clear Congressional intent to encourage competition by limiting the bargaining power of dominant entities in the programming industry. The present situation is no different: the Commission must aggressively develop and enforce rules which assure that emerging MVPDs, whether they are relatively large entities like EchoStar and DirecTV, or as yet niche video providers like RCN, have fair and reasonable access to critical programming.

In such circumstances, it is important that the Commission state unequivocally that SHVIA applies to all MVPDs. It is important to adopt stringent regulations defining what constitutes “good faith” and “competitive market considerations.” Undoubtedly “good faith” in the context of retransmission consent negotiations requires more than a simple willingness to meet and the absence of a refusal to deal. RCN suggests that “good faith” for this purpose be defined as the willingness to bargain such as exists between two equally situated arms-length parties, both of which desire to reach agreement on terms which are commercially reasonable. Any such definition, of course, is only useful as a starting point. While the specifics of bad faith

negotiations set forth in sec. 51.301(c)⁸ of the rules are not applicable to the present context, nevertheless RCN urges the Commission to develop a comparable list of behaviors which will be considered presumptive of the absence of good faith. “Competitive market considerations” similarly is difficult to define and any definition must be applied thoughtfully. At a minimum this should exclude any factors whose purpose or effect is to produce anti-competitive results. Without adopting a standard of non-discrimination which would be appropriate in a Title II context, the Commission can nevertheless conclude under the language of SHVIA that discriminatory behavior intended to reduce competition or eliminate competitors is presumptively outside the scope of “good faith” as set forth in sec. 325(b).

RCN agrees that adopting practical and meaningful definitions of these broad statutory phrases is no easy task. But this is not to say the Commission can avoid making the effort in either respect. Among other ways to establish acceptable behavior, the Commission can list nonexclusive examples of unacceptable negotiating practices or substantive terms.

RCN therefore endorses the views set forth by Bell South and its affiliates and EchoStar and DirecTV in their initial comments. Specifically RCN believes it is critical for the Commission to give substance to the meaning of “good faith” and to clarify that competitive market considerations cannot be a cloak for hiding arrangements with any MVPD which are anticompetitive in purpose or effect. Tying arrangements, which are all too common in the negotiating positions of broadcasters, should be considered *prima facie* unlawful. RCN endorses as well NCTA’s view that “good faith” should mean that broadcasters may not engage in negotiations which amount to a take-it-or-leave-it proposal, on terms that are unreasonable or

⁸ 47 C.F.R. sec. 51.301.

tantamount to a refusal to deal. Dilatory or dishonest negotiating tactics should be disallowed.⁹

At the same time it is crucial that the Commission adopt procedural rules which give parties complaining of unfair or unlawful treatment a reasonable opportunity to develop a record before the Commission. As BellSouth notes, to require a complainant to have sufficient evidence initially to justify further discovery is to essentially eviscerate any meaningful opportunity to explore instances of *prima facie* unlawful conduct. The Commission should not adopt a rule which creates, at the outset, a hurdle so high that complainants can virtually never get access to discovery, as is currently true in the administration of the Program Access Complaint procedures.¹⁰ As EchoStar states, programming disputes are intensely factual and no set of rules or guidelines will be worth much if the administration of the Complaint procedure is distorted by unrealistic initial burdens of going forward. Finally, it is important that the timeframes for adjudicating disputes be short: for the newcomer struggling to survive in the unforgiving marketplace to be delayed for many months while the FCC deliberates is to significantly diminish the utility of the rights created in statute and by implementing regulation.

Respectfully submitted,

RCN TELECOM SERVICES, INC.

By: 

William L. Fishman

Swidler Berlin Shereff Friedman, LLP

3000 K Street, NW, Suite 300

Washington, D.C. 20007

(202) 945-6986

January 21, 2000

⁹ Comments of NCTA at 4.

¹⁰ EchoStar suggests that the Commission adopt rules setting forth *per se* violations of the retransmission consent rules, and that a sworn allegation of such a *per se* violation should be enough to shift the burden to the defendant. EchoStar Comments at 21-22. RCN agrees that such a procedure is vital to give meaning to the Commission's rules.